Supreme Court, U.S.
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No. 01-527

IN THE

Supreme Court of the United States

ROBERT A. ERKINS & BERNADINE ERKINS,

Petitioners,

v.

ALFRED J. BIANCO, As Plan Administrator
to the Estate of Gaston & Snow,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Second Circuit, consistent with the other circuits that have considered the issue, correctly hold that, under a long line of Supreme Court cases, including *Erie, Klaxon, O'Melveny & Myers* and *Atherton*, a bankruptcy court hearing a state law breach of contract claim that does not implicate any federal policy should apply the choice of law rules of the forum state?

RULE 29.6 STATEMENT

With the approval of the Bankruptcy Court for the Southern District of New York, Respondent Alfred J. Bianco, as Plan Administrator to the Estate of Gaston & Snow, assigned the claims that are the subject of this action to Pana-Tek, Inc., a California corporation, and Tina Panagiotou in return for a payment and share of any recovery in the action. Pana-Tek, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

This case concerns attempts by former clients of a law firm to avoid paying their debts. The petitioners, Robert and Bernardine Erkins, retained the Massachusetts and New York-based law firm of Gaston & Snow ("G&S") to defend them in a multi-million dollar lawsuit. G&S provided the Erkins with substantial services and achieved excellent results: a jury dismissed the claims against the Erkins and awarded them $2 million on their counterclaims. But the Erkins refused to pay for G&S's services. Before G&S commenced suit to collect this debt, an involuntary bankruptcy petition against G&S was filed in the Southern District of New York.

Alfred J. Bianco, as Plan Administrator for the estate of G&S, sued the Erkins in Bankruptcy Court in the Southern District of New York pursuant to 28 U.S.C. § 1409(a), which authorizes an action for monies owed to the debtor to be filed in the district court where the bankruptcy proceeding is pending. Bianco alleged claims of breach of contract, account stated and *quantum meruit*. The Erkins consented to personal jurisdiction over them in the Southern District of New York and counterclaimed for professional malpractice and breach of contract. They also moved for a change of venue to Idaho arguing not that venue was improper but that it was inconvenient. That motion was denied.

Because this lawsuit constituted a non-core proceeding that concerned only state law issues and no substantive bankruptcy provision, the parties consented to withdrawing the reference of the action to the Bankruptcy Court, and to having Bianco's claims and the Erkins' counterclaims tried before a jury in the United States District Court for the Southern District of New York.

Contrary to petitioners' contention that Bianco's complaint alleged only breach of a written contract, the complaint simply alleged a cause of action for "breach of contract," as well as account stated and *quantum meruit*. Although the Erkins describe the oral contract claim as an "unexpected change in the theory of the case" presented at trial, that claim was specifically asserted during discovery. Indeed, the Erkins moved to amend their answer before trial to include defenses to the breach of oral contract claim.

The Erkins have never disputed that under New York's choice of law, New York's six-year statute of limitations governed Bianco's breach of contract claim. And it is undisputed that under New York's statute of limitations, Bianco timely filed his claim. On the fourth day of trial, however, the Erkins argued that it was unconstitutional to apply New York's statute of limitations to them because they had no connection to New York. The Erkins contended that the trial court should instead apply Idaho's four-year statute of limitations for oral contracts. The district court rejected their argument and applied New York's statute of limitations.

On appeal to the Second Circuit, the Erkins argued for the first time that federal choice of law, and not state choice of law, should determine whether the statute of limitations of New York or Idaho governed this action. In deciding the appeal, the Second Circuit addressed the question:

> whether a bankruptcy court hearing claims that are based on state law and do not implicate federal policy should apply federal choice of law rules or whether the rule of *Klaxon v. Stentor Elec. Manuf. Co.*, 313 U.S. 487 (1941), that federal courts

> exercising diversity jurisdiction must apply the choice of law rules of the forum state, should be extended.

(Petitioner's Appendix [hereinafter "Pet. App."] 2a.)

In answering this question, the Second Circuit held that:

> Because federal choice of law rules are a type of federal common law, which federal courts have only a narrow power to create, we decide that bankruptcy courts confronting state law claims that do not implicate federal policy concerns should apply the choice of law rules of the forum state.

(Pet. App. 3a.)

In so holding, the Second Circuit followed this Court's recent pronouncements in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), and *Atherton v. FDIC*, 519 U.S. 213 (1997), that "cases in which judicial creation of a special federal rule would be justified . . . are 'few and restricted' " and only arise where there is "a significant conflict between some federal policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87; *Atherton*, 519 U.S. at 218. Indeed, in *O'Melveny*, this Court found that its "cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision" and it is only the "extraordinary cases" that would justify the displacement of state law. 512 U.S. at 87, 89.

The Second Circuit correctly held that, in this matter, there was no such conflict between some federal policy and state law to justify the creation of federal law. (Pet. App. 13a-14a). The Erkins alleged that a federal policy against forum shopping supported the creation of federal law.

But the Second Circuit held (and the Erkins agree) that no forum shopping occurred in this case because G&S was placed involuntarily into bankruptcy in the Southern District of New York. (Pet. App. 14a; Petition 12.) The Second Circuit also recognized that forum shopping in bankruptcy is strictly limited. (Pet. App. 14a.) Under 28 U.S.C. § 1408, a bankruptcy proceeding may only be brought where a debtor is incorporated, headquartered or has its principal assets.

The Second Circuit also rejected the argument that an interest in uniformity of choice of law between federal courts sitting in different states would justify the creation of federal common law because that argument had already been addressed and rejected by this Court in *Klaxon v. Stentor Elec. Manuf. Co.*, 313 U.S. 496 (1941).

Because the Second Circuit found no federal policy that conflicted with the application of state choice of law rules, it held that the creation of federal common law was not warranted. Accordingly, it properly applied the choice of law rules of New York, the state in which the District Court is seated. New York choice of law applies New York's statute of limitations and therefore there is no question that Bianco's claim against the Erkins was timely.

REASONS FOR DENYING THE WRIT

This Court should deny the Erkins' petition for several reasons. First, there is no conflict among the circuits for this Court to address. To the contrary, the circuit courts agree on the method used to determine whether to apply state or federal choice of law rules in bankruptcy proceedings. Specifically, the circuits agree with the Second Circuit's holding that in order for bankruptcy courts to displace state choice of law

rules with federal common law, "a significant conflict between some federal policy or interest and the use of state law must be specifically shown." (Pet. App. 13a (quoting *Atherton*, 519 U.S. at 218).) Petitioners have not identified any federal policy or interest to justify the creation of federal law in this case. This case, which concerns a law firm's attempt to collect a debt, is plainly a matter of state law that does not implicate any federal policy.

Second, the Second Circuit's decision is consistent with the approach taken by other circuits in federal question cases arising outside the bankruptcy context. The circuits have consistently abided by this Court's recent pronouncements in *O'Melveny* and *Atherton* that cases warranting the creation of federal common law are "few and restricted," and petitioners have not cited any cases demonstrating a conflict in the application of these authorities. Intervention by this Court now, therefore, is premature and unwarranted.

Third, petitioners' arguments for why this Court should correct an alleged error in this individual case are without merit. Finally, this Court should deny the petition because this case is not an appropriate vehicle for this Court to address a narrow issue that is unlikely to recur in this exact posture again.

I. The Circuits Agree On The Method Used To Determine Whether To Apply State Or Federal Choice Of Law In Bankruptcy Cases.

Contrary to petitioner's argument, all of the federal circuit courts that have considered whether to apply state or federal choice of law rules in bankruptcy cases have applied the legal standard applied by the Second Circuit in this case.

Therefore, there is no conflict among the circuits for this Court to address. The circuit courts have uniformly held that a significant conflict between some federal policy and the use of state law must exist before a federal court may create federal common law and apply a federal choice of law analysis. While the facts or issues in individual cases may have caused a circuit court to find that a federal policy was implicated, the circuit courts have not split on the legal standard for deciding when a bankruptcy court may apply federal choice of law rules and displace state choice of law rules.[1] Because the Second Circuit's decision is consistent with the legal standard applied by all the circuits that have so far addressed this issue, consideration of this matter by this Court is not necessary to resolve a circuit split or provide direction to the lower courts.

Only three of the circuit court decisions cited by petitioners considered the question whether federal or state choice of law rules apply in the bankruptcy context. *See In re Merritt Dredging Co. v. Campbell*, 839 F.2d 203 (4th Cir. 1988); *In re Lindsay*, 59 F.3d 942 (9th Cir. 1995); *In re Crist*, 632 F.2d 1226 (5th Cir. 1980). All of these decisions applied the same legal standard as the Second Circuit. Applying that uniform standard, the Second and Fourth Circuits concluded that, under the facts in their cases, state choice of law rules governed. The Ninth and Fifth Circuits concluded that, under the particular facts of their cases, a federal interest was implicated and therefore federal choice of law rules should apply.

1. The Second Circuit recognized that in the bankruptcy context, some circuits had applied federal choice of law rules and some had applied state choice of law rules. The Second Circuit, however, did not analyze the method by which those circuits had come to their results and did not attempt to reconcile the results reached by those courts.

In re Merritt concerned whether a debtor had a property interest in a barge the debtor had hired before filing for bankruptcy. The Fourth Circuit held that the question of the extent of a debtor's property interest did not implicate any federal bankruptcy policy and was solely a matter of state law: "[I]n the absence of a compelling federal interest which dictates otherwise, the *Klaxon* rule should prevail where a federal bankruptcy court seeks to determine the extent of a debtor's property interest." 839 F.2d at 205.

There was no substantive bankruptcy law being interpreted or applied by the Fourth Circuit. Because the case did not implicate an "overwhelming federal policy", the Fourth Circuit applied state choice of law rules. *Id.* at 206. The Fourth Circuit also found that it would be anomalous to have the same property interest governed by state choice of law rules in federal diversity proceedings and by federal choice of law rules in bankruptcy proceedings. *Id.* at 206. The Fourth Circuit, therefore, applied the same legal standard as the Second Circuit in this case.

So did the Ninth Circuit in *In re Lindsay*, 59 F.3d 942 (9th Cir. 1995). That case involved a core bankruptcy matter concerning the administration of the debtor's estate: whether a foreclosure sale was a fraudulent conveyance for the purposes of 11 U.S.C. § 548 of the bankruptcy laws. Because the case concerned a core bankruptcy matter, the bankruptcy court, and not the district court, conducted the trial and applied federal choice of law to determine which state's law the bankruptcy court should look to in determining whether there had been a fraudulent conveyance under the Bankruptcy Code. On appeal, the Ninth Circuit recognized that fraudulent

conveyance under 11 U.S.C. § 548 is the subject of a substantive federal statute at the heart of bankruptcy law and could only have been addressed in federal court. *In re Lindsay*, 59 F.3d at 948. Therefore, the Ninth Circuit reasoned, the value of a uniform national approach to the issue was sufficient to supplant any state choice of law rules. *Id.*

Only after finding a federal interest in uniformity of application of a substantive provision of the bankruptcy laws did the Ninth Circuit choose to supplant state choice of law rules. In reaching its result, therefore, the Ninth Circuit applied the same standard as the Second Circuit for determining whether to apply state law or create federal common law. The Second Circuit, however, was not faced with a core bankruptcy proceeding implicating bankruptcy law, but was faced with an adversary proceeding concerned only with substantive state law claims. These claims could have been brought by Bianco in a state court or in a federal court under the diversity statute, and therefore were not matters exclusive to the Bankruptcy Court. Under the Ninth Circuit's rationale in *In re Lindsay*, it is likely that the Ninth Circuit would have reached the same result as the Second Circuit if faced with the issue presented here because the factor that allowed the Ninth Circuit to create federal common law, the existence of a core bankruptcy matter that could only be adjudicated in the federal courts, does not exist in this case.

The final case addressing choice of law in bankruptcy, *In re Crist*, 632 F.2d 1226 (5th Cir. 1980), concerned the discharge of a debt in bankruptcy, a core question that can only arise in federal court. In *Crist*, the Fifth Circuit observed that whether to apply state or federal choice of law requires

a court to choose which law – state or federal – was "considered relevant to the pending controversy." *Id.* at 1229. Because the question presented to the court in *Crist* was inextricably linked to the substantive provisions of the bankruptcy code, the Fifth Circuit applied federal choice of law.

In light of the uniformity among the circuits on the issue of how to determine whether federal or state choice of law applies in bankruptcy proceedings, there is no circuit split for this Court to resolve.

II. The Circuits Have Been Consistent In Their Application Of The Principles Set Forth In *O'Melveny* And *Atherton*.

The Second Circuit's decision is not only consistent with the decisions of other circuits in the bankruptcy context, it is consistent with the approach taken in other federal question cases. In the federal cases outside the bankruptcy context cited by petitioners, the circuits followed this Court's dictates in *O'Melveny* and *Atherton* and analyzed whether application of federal choice of law rules is justified by a significant conflict between some federal policy or interest and the use of state choice of law. This approach is exactly the same as that taken by the Second Circuit in this case and is consistent with this Court's prior decisions.

In *A.I. Trade Finance, Inc. v. Petra International Banking Corp.*, 62 F.3d 1454 (D.C. Cir. 1995), the D.C. Circuit addressed the question whether to apply state or federal choice of law in a suit arising under the Edge Act. The Edge Act provides a federal forum and limited federal substantive

rules on corporate governance for matters involving international banking. The substantive issue in *A.I. Trade* was not addressed by a provision of the Edge Act. Citing *O'Melveny*, the D.C. Circuit determined that it could not create federal common law to fill in the gaps in the Edge Act and instead looked to state law to supply the rule of decision. In order to determine which state law to apply, the D.C. Circuit applied the forum state's choice of law because state law governed the substantive issues in the case and "[i]t is the source of the right, not the basis of federal jurisdiction, which determines the controlling law." *Id.* at 1465 (citation omitted). Because the matter involved only state substantive law, the D.C. Circuit stated that:

> We see no reason to remove the Edge Act from what appears to be the general rule: a federal court applies state law when it decides an issue not addressed by federal law, regardless of the source from which the cause of action is deemed to have arisen for the purpose of establishing federal jurisdiction.

Id. at 1463.

The D.C. Circuit reasoned that its result was consistent with the strict limitations *Erie* and *O'Melveny* placed on the development of federal common law. Unlike the narrow reading of *Erie* urged by petitioners, the D.C. Circuit recognized that "[t]he *Erie* doctrine is not simply a rule of convenience for diversity cases but an acknowledgment of the powers of the several states and of the limited nature of the federal government." 62 F.3d at 1464. The D.C. Circuit also found that uncertainty would arise if litigation involving

an Edge Act corporation were subject to "horizontal uniformity" of a federal choice of law rule while the vast majority of similar banking transactions are subject to the vertical uniformity of state choice of law rules under *Klaxon*. *Id.*

A similar concern would be raised in this case, where non-core claims brought in bankruptcy would be subject to different choice of law rules than the same claims brought in federal court pursuant to diversity jurisdiction or in state court. The D.C. Circuit's approach is therefore completely consistent with the Second Circuit's decision, which applied state choice of law because state law governed the substance of Bianco's claims.

In *Bickel v. Korean Air Lines Co.*, 83 F.3d 127 (6th Cir. 1996), the Sixth Circuit considered whether state or federal choice of law should apply to a matter governed by the Warsaw Convention.[2] The court in *Bickel* recognized that this Court's decision in *O'Melveny* sharply limited the circumstances under which federal common law should be created. Therefore, it was only after finding that the Warsaw Convention implicated "concrete federal policy of uniformity and certainty" that the Sixth Circuit decided to apply a federal choice of law rule to the matter before it. *Id.* at 130 (citation omitted). The result reached by the Sixth Circuit took into account that a matter arising under the Warsaw Convention concerns the laws of different nations, not the laws of different states. A matter arising under the Warsaw Convention therefore implicates a national interest in uniform application. For the same reason, the Ninth Circuit's decision in *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000 (9th Cir. 1987), a case arising under the Warsaw

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2. Petitioners are incorrect in stating that *Bickel* arose under the Foreign Sovereign Immunities Act.

Convention and the Federal Sovereign Immunities Act, properly applied federal choice of law.

The only case that rendered a result arguably inconsistent with the Second Circuit's decision is *Edelmann v. Chase Manhattan Bank*, 861 F.2d 1291 (1st Cir. 1988). *Edelmann*, like *A.I. Trade*, concerned the application of state law pursuant to Edge Act jurisdiction. In *Edelmann*, the First Circuit, without discussion, applied federal choice of law rules to determine which state's law to apply to the substantive issue in the case. *Edelmann* has been criticized both for its result and for its failure to consider the precise character of the federal jurisdiction it faced. *See A.I. Trade*, 62 F.3d at 1465 ("In *Edelmann* the First Circuit did not discuss the choice-of-law issue in depth. It merely stated in a footnote that 'when jurisdiction is not based upon diversity of citizenship, choice of law questions are appropriately resolved as matters of federal common law.'"). Furthermore, *Edelmann* was rendered *before* this Court's decisions in *O'Melveny* and *Atherton* and has been questioned for that reason. *See A.I. Trade*, 62 F.3d at 1465 (stating that *Edelmann* "wrote without the benefit of some of the Supreme Court's more recent pronouncements upon the limited domain of federal common law.").

III. The Policy Justifications Enunciated By Petitioners Do Not Support The Wholesale Rejection Of The Principles Of *Erie* And *Klaxon*.

In seeking the wholesale rejection of the principles of *Erie* and *Klaxon*, petitioners have not identified any significant conflict between federal policy and the application of state choice of law rules or any justification for a departure from the principles of *Erie* and *Klaxon* when adjudicating

state law claims in a bankruptcy proceeding. Neither of the reasons asserted by petitioners – the risk of forum shopping or the need for uniformity of outcome – justify the creation of federal law in this case.

A. The Second Circuit's Decision Does Not Raise The Risk Of Forum Shopping.

The federal interest that petitioners seek to identify to justify the application of federal choice of law rules is that debtors in bankruptcy will shop for the state with the most favorable substantive law. (Petition 12 ("[T]he prospective effect of the decisions below will be to encourage a debtor or creditor to file the petition for bankruptcy in the state where the local law is most hospitable to its claims.").) But this case does not provide an appropriate forum for addressing this stated concern because petitioners admit that Bianco did not forum shop here, where the bankruptcy filing was involuntary. Furthermore, even where a bankruptcy proceeding is commenced through a voluntary filing, forum shopping is of only minimal concern because a proceeding may only be commenced where the debtor is incorporated, headquartered or maintains its principal assets. *See* 28 U.S.C. § 1408. Finally, *Klaxon* prevents a debtor from shopping for the forum "where the local law is most hospitable to its claims" by holding that the applicable law is not necessarily the law of the forum but rather the law dictated by the forum's choice of law principles.

B. There Is No Federal Interest In Uniformity In This Case Sufficient To Supplant The Use Of State Law.

Petitioners also assert that a federal interest in "uniformity of outcome" requires application of federal

choice of law in this case. (Petition 13.) The argument that uniformity of choice of law between federal courts sitting in different states would justify the creation of federal common law has already been addressed and rejected by this Court in *Klaxon v. Stentor Elec. Manuf. Co.*, 313 U.S. 496 (1941). Furthermore, in this case no uniformity could be achieved by applying federal choice of law because this matter is not one that is exclusively venued in bankruptcy court. Rather it could have been brought in federal court pursuant to diversity jurisdiction or indeed in a state court, in which case there would be no question under *Klaxon* that the forum state's choice of law rules would apply.[3]

IV. There Is No Conflict Between The Holdings Of *Sun Oil* And *Guaranty Trust.*

Petitioners also argue for review of this case in part based on a misreading of this Court's decisions in *Sun Oil v. Wortman*, 486 U.S. 717 (1988), and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Petitioners assert that these two decisions have caused "confusion over whether the choice of a statute of limitations is substantive or procedural." (Petition 8.) According to petitioners, this confusion stems from an alleged conflict in the Court's holding in *Guaranty Trust Co.* that statutes of limitations are "substantive" for *Erie* purposes with the Court's subsequent holding in

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3. It is undisputed below that Bianco could have brought this action in state or federal court in Massachusetts. In such a case, Bianco's claims would still be timely because such an action would have been governed by Massachusetts' six-year statute of limitations. *See Cosme v. Whitin Mach. Works, Inc.*, 417 Mass. 643, 645, 632 N.E.2d 832, 834 (1994) (Massachusetts considers statutes of limitations as procedural and, as the forum state, applies its own law).

Sun Oil Co. that statutes of limitations can be "procedural" for the purposes of an individual state's choice of law. (Petition 7-8.) But this "conflict" is not a conflict at all. Indeed, in *Sun Oil*, this Court held that "*Guaranty Trust* itself rejects the notion that there is an equivalence between what is substantive under the *Erie* doctrine and what is substantive for purposes of conflicts of laws." *Sun Oil*, 486 U.S. at 726.

V. There Is No Constitutional Error In This Case Requiring Correction By This Court.

Finally, petitioners argue that this Court should review this case to correct errors in this individual case made by the Second Circuit. But petitioners have pointed to no error made by the Second Circuit.

Petitioners argue that application of New York choice of law by the Second Circuit is unconstitutional because New York's borrowing statute unfairly favors New York residents. However, as non-residents of New York, the Erkins have been treated exactly the same as a defendant who resides in New York would have been treated under New York's borrowing statute. The borrowing statute does not discriminate against non-resident defendants at all; it merely applies New York's statute of limitations or the statute of limitations of the place where the action accrued, which ever is shorter, unless the *plaintiff* is a New York resident, in which case the statute applies New York's statute of limitations.[4]

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4. As the Second Circuit recognized, petitioners waived any objection to the treatment of G&S as a New York resident. However, even if G&S were not a New York resident, in this case, the cause of action accrued in Massachusetts. Therefore, the six-year statute of limitations of Massachusetts would apply and Bianco's claim would still be timely. (Pet. App. 18a-19a n.7.)

Because petitioners would have been treated no differently if they had been residents of New York, they do not have standing to complain of any unconstitutional application of New York's borrowing statute.

Finally, petitioners argue that the application of New York's statute of limitations is unconstitutional because an action could not have been brought against them in New York state court. As the Second Circuit found, however, petitioners conceded that the Southern District of New York had personal jurisdiction over them for purposes of adjudicating Bianco's claims. (Pet. App. 19a.) Consequently, as the Second Circuit held, under *Sun Oil*, 486 U.S. at 729-30, "there is no constitutional barrier to utilizing New York's statute of limitations." (Pet. App. 19a.) Moreover, petitioners affirmatively sought relief on their counterclaims in the Southern District of New York. By consenting to and invoking the jurisdiction of a New York federal court, the petitioners also consented to that court's application of New York choice of law.

VI. Because Of The Manner In Which This Issue Was Raised, This Case is Not An Appropriate Vehicle To Address This Issue.

Procedurally, this case presents a poor vehicle for the reexamination of the principles of *Erie* and *Klaxon*. This case involves an unusual fact pattern unlikely to recur. After G&S was involuntarily put into bankruptcy in the Southern District of New York, petitioners consented to the jurisdiction of the Southern District of New York to hear Bianco's claims and petitioners' counterclaims. Petitioners also previously asserted that New York's choice of law governed the determination of which state's substantive law governed

Bianco's breach of contract claim. Now, however, petitioners argue against the application of New York choice of law rules because they seek to avoid the result required by those rules. If this Court were to find that federal choice of law rules applied to the question whether New York's statute of limitations applied, the result would be that New York choice of law provided the substantive rule of law in the case but federal choice of law directed which statute of limitations applies. The instant case, therefore, does not provide a clear, uncomplicated vehicle to address any of the issues petitioners seek to have reviewed by this Court and presents a factual situation unlikely to recur.

Furthermore, reversal of the Second Circuit's decision would not dispose of this case. Rather, as both the district court and the Second Circuit recognized (and contrary to petitioner's argument to this Court), if Idaho's statute of limitations applied, this matter would have to be remanded to the District Court perhaps for a new trial to determine whether Bianco's breach of contract claim is timely even under Idaho law. The case would also have to be remanded for a new trial on Bianco's account stated claim, which the jury never considered since the court had instructed the jury that if it found for Bianco on his breach of contract claim, the jury should not proceed to consider the account stated claim. (App. at 2a-5a.)

CONCLUSION

Because this case involves no conflict between use of state choice of law and an identifiable federal interest, "this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted." *O'Melveny & Myers*, 512 U.S. at 89. For the above reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 17, 2000

[commencing at page 1315]

99 CV 9343 (JSR)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALFRED J. BIANCO, as Plan Administrator to the Estate of Gaston & Snow,

Plaintiff,

v.

ROBERT A. ERKINS and BERNARDINE ERKINS,

Defendants.

March 17, 2000
9:00 a.m.

Before:

HON. JED S. RAKOFF

District Judge

* * *

[1324] MR. MOSS: Your Honor, may I raise one more point. I raised this with Mr. Cohen this morning. Your Honor was good enough to rule, for any appellate record in this case, if the statute of limitations to be applied were the Idaho statute, and the New York state borrowing statute were to be disregarded, then the oral contract claim would be barred by the four-year Idaho statute of limitations and a quantum meruit claim would be similarly barred by the four-year Idaho statute of limitations.

THE COURT: Not quite. The quantum meruit would be barred. That was the ruling of the Court. I indicated I thought you had a very strong argument for the barring of the oral contract claim in that instance, but I did not make a ruling on that. I simply indicated, in trying to be of some [1325] help to the Court of Appeals, that you had made, and I regarded it as a substantial record, the argument that there was insufficient evidence to show that there had been a meeting of the minds on the forbearance aspect of an oral contract that would have to take effect if the statute of limitations were four years in order for that contract to be timely; whereas, as all counsel are agreed, and the Court is agreed, it would be an irrelevancy in terms of the contract if the six-year statute of limitation applied. So that was my ruling in that regard. It was not a final ruling.

MR. MOSS: What there was no discussion of at that time was the third claim that has gone to the jury, which if it were bound by the Idaho statute of limitations would similarly be bound by a four-year statute of limitations, that is to say, the account stated. As I understand the theory of the account stated, it arises from the January 1990 memorandum

submitted by Mr. McCabe to the Erkins and the argument that, because there was not very shortly thereafter an objection to it, it became, under Idaho contract law, an account stated. We believe that that also would be time-barred if the four-year statute of limitations were applied rather than a six-year statute.

THE COURT: That is an interesting question. It clearly has to be plaintiffs' position that that agreement, or that the meeting of the minds on the account stated, which is [1326] really a quasi-contract type of agreement, has to have occurred before June, because that is when there was the request for the back-up and the sort of walking away from, if you would, what had to be agreed to earlier or acquiesced in earlier. It was interesting, in that I was wondering whether either counsel was going to request, and neither counsel did, any particular charge to the jury on what constitutes a reasonable time within which someone objecting to an account stated has to indicate their disagreement. Had I been asked to give such a charge, I probably would give the charge along the lines that you have to look at all the facts and circumstances with respect to the context. That is, I am sure, the way the jury would view it. But neither side submitted such a request to charge at all, so I didn't give it.

In argument outside the presence of the jury, the plaintiffs argued that the acquiescence was in effect confirmed by a series of documents, as well as oral testimony, not all of which we got through, but we started down that line, and I am trying to remember what the dates were on those documents.

MR. KLAUSNER: I have some responses to Mr. Moss's point. But, to be responsive to your Honor, there was, for example, a May 18, I believe it is, May 18, May 19, letter from Gaston & Snow to Mr. Erkins, which again confirms the [1327] agreement. We think there is sufficient evidence that it would extend certainly beyond the March period, the acquiescence probably occurred in the April-May period.

THE COURT: I am not prepared to say that claim is time-barred on the hypothetical that defense counsel has raised. I never ever try to predict what a jury would do, and therefore I certainly would not want to do so here, but just statistically there is only a one-third chance, if they find liability at all, that they will find it on the account stated, so this may all be moot.

In any event, I think defense counsel was willing to ask for the Court's advice on that. Since I have expressed my view on the other two for purposes of appeal, my view is that it is not a sufficient basis that that claim would fall because of the statute of limitations.

MR. MOSS: That is to say, that it is not clear one way or the other?

THE COURT: That would have required a special verdict by the jury as to at what point in time did they believe that the defendants by their acquiescence had asserted to the account stated.

MR. MOSS: Understand that our point there is that the silence constitutes a tacit agreement, how much silence does

Idaho law require before it is now an account stated? That that silence can't be more than two months. That is what [1328] it would have to be in this case for the period to extend.

THE COURT: It is a reasonable argument, but the point is, and the whole reason the law uses the word "reasonable," is that it is very context-related. One can certainly imagine situations in Idaho in 1890 when the mere difficulties of communication might have made six months an appropriate period. And one can imagine an argument in the modern age where, in many contracts, a contract for the sale of stock over the Internet, that acquiescence beyond a few days would be unreasonable. So I think it is highly context-related. And because there are competing factual assertions in that regard, I think it would have to be determined by the jury.

So, if your point is, am I making a determination that the claim is not barred as a factual matter? No, I am not saying that. I am saying that, as a matter of law, assuming a four-year statute of limitations, I could not strike that claim. It would have to be sent to the jury with a special instruction to determine whether there was, in effect, a meeting of minds.

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